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UNITED STATES DISTRICT COURT
Southern District of Ohio, Western Division.

No. 3116

HELENE I. PFEIFER, Box 131, R. R. 2, New Carlisle, Indiana; CHARLOTTE F. MORGAN, c/o Captain Cullen B. Morgan, McCord Air Force Base, Tacoma, Washnigton; ARTHUR R. MICHEL, 9714 Burnet Avenue, San Fernando, California,

Plaintiffs,

vs.

THE CINCINNATI BUTCHERS' SUPPLY COMPANY, a corporation organized and existing under the laws of the State of Ohio, Elmwood Place, Ohio; WILLIAM C. SCHMIDT, 1049 North Bend Road, Cincinnati, Ohio; CARL OSCAR SCHMIDT, Jr., also known as C. Oscar Schmidt, Jr., 405 Meadow Lane, Wyoming, Ohio,

Defendants.

COMPLAINT

1. Plaintiff, Helene I. Pfeifer, is a citizen of the State of Indiana. Plaintiff, Charlotte F. Morgan, is a citizen of the State of Washington. Plaintiff, Arthur R. Michel, is a citizen of the State of California.

The defendant, The Cincinnati Butchers' Supply Company, is a corporation incorporated under the laws of the State of Ohio. Each of the defendants, William C. Schmidt and Carl Oscar Schmidt, Jr., also known as C. Oscar Schmidt, Jr., is a citizen of the State of Ohio.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

2. The plaintiff, Helene I. Pfeifer, is the holder and owner of sixty-two (62) shares of the common capital stock of The Cincinnati Butchers' Supply Company. The plaintiff, Charlotte F. Morgan, is the owner and holder of sixty-two (62) shares of the common capital stock of The Cincinnati Butchers' Supply Company. The plaintiff, Arthur R. Michel, is the owner and holder of two hundred and twenty-five (225) shares of the common capital stock of The Cincinnati Butchers' Supply Company. The said shares are registered in the names of said plaintiffs respectively. Each of said plaintiffs is a grandchild of the founder of defendant Company and has owned shares of defendant Company for more than ten (10) years last past.

3. The defendant, The Cincinnati Butchers' Supply Company, has issued and outstanding a total of five thousand four hundred and ninety-eight (5,498) shares of common capital stock, held by approximately seventeen (17) shareholders, and has outstanding no other shares or class of shares, other than as aforesaid.

4. Prior to the year 1946 the defendants, William C. Schmidt and Carl Oscar Schmidt, Jr., also known as C. Oscar Schmidt, Jr., owned and controlled less than a majority of the outstanding shares of the defendant, The Cincinnati Butchers' Supply Company. On or about the year 1946 said individual defendants, together with their mother, acquired additional shares, so that with the shares already owned, the said defendants and their said mother after said date owned or controlled a total of three thousand one hundred and fifty (3,150) shares of the said defendant, The Cincinnati Butchers' Supply Company, or approximately 57.29% of its outstanding shares, and sub-

sequently acquired one hundred and fifty (150) shares, making a total of three thousand three hundred (3,300) shares, or 60.02% of the outstanding shares. Said individual defendants have been elected as two of the three members of the Board of Directors of defendant Company. By virtue of the powers purported to be conferred on them as a majority of the Board of Directors and as officers of the defendant Company and over the protest of Herman Schmidt, the third member of the Board of Directors of the defendant Company, the said individual defendants, pursuant to a wrongful combination and plan, have violated and continue to violate the rights of these plaintiffs to reasonable dividends as provided by law and by their actions threaten to have said corporation availed of for the purpose of proventing the imposition of surtaxes upon themselves as shareholders of defendant Company, through the medium of permitting earnings or profits of the defendant Company to accumulate beyond the reasonable needs of the business of defendant Company, instead of being divided or distributed among shareholders. Said individual defendants thereby threaton to render said defendant Company subject to the imposition of penalty taxes under Section 102 of the Internal Revenue Code of the United States.

5. The defendants, William C. Schmidt and Carl Oscar Schmidt, Jr., have entered into said wrongful combination and plan for the purpose of operating the affairs of said Corporation for their respective personal benefits and interests and contrary to the interests of the defendant Company, the plaintiffs and other minority stockholders of the defendant, The Cincinnati Butchers' Supply Company, and of each of them. Said individual defendants have proceeded to carry out said combination and plan, are continuing to operate said Company under said wrongful

combination and plan, and will continue so to do, unless relief is granted by this Court.

6. Said combination and plan and the execution thereof by the defendants are clearly unreasonable and not in the exercise of good faith with said defendant Company and plaintiffs, or any of them, but on the contrary are for the purpose of achieving wrongful personal benefits for the said individual defendants; said combination and plan unreasonably and wrongfully deprive plaintiffs of reasonable dividends; said combination and plan are motivated by personal benefits to said individual defendants and by animosity to the minority stockholders and are accompanied by other actions showing disregard of the rights of plaintiffs. Said individual defendants have wrongfully diverted earnings of defendant Company to themselves by unjustified increases in their salaries and by other actions and by changing a salary and dividend plan previously in effect. By the actions aforesaid, the individual defendants have unreasonably depreciated the market value of the shares of stock in the defendant Company held by these plaintiffs and have enabled the said individual defendants to acquire stock of The Cincinnati Butchers' Supply Company at prices below its fair value. Said individual defendants have profited and continue to profit from the said impairment of the marketability of the stock by the wrongful and unreasonably low dividends. The dividend policy of defendant Company has been formulated by the said individual defendants to achieve said wrongful and unfair advantages and the said combination and plan and the actions of the said defendants cause irreparable damage to these plaintiffs contrary to law and contrary to the equity and rights of these plaintiffs.

7. On or about May 11, 1940 the Board of Directors of the defendant Company, after full consideration of reason-

able compensation for executive officers and reasonable dividend payments to stockholders, duly adopted by unanimous action of the said Board of Directors, including said individual defendants, a plan for the payment of salaries and for the payment of dividends, known as a "Salary Dividend Plan."

Under said Plan a basic pay of Three Thousand Nine Hundred ($3,900.00) Dollars per year was established for each of the following officers, if the dividends paid did not exceed One Dollar and Fifty Cents ($1.50) per share per year: President, three Vice Presidents, Secretary, Assistant Secretary, Treasurer and Assistant Treasurer. Under said Plan if the dividends exceeded One Dollar and Fifty Cents ($1.50) per share, the dividends paid to shareholders in excess of One Dollar and Fifty Cents ($1.50) per share —that is, an amount equal to the excess—was to be put into a bonus fund, which was to be divided as follows: Twenty (20%) percent each to the President and one Vice President, and ten (10%) percent to each of the other six officers. Said Plan was in full force and effect when the individual defendants obtained control of a majority of the shares of the said Corporation.

8. Had said Plan continued in effect after the said individual defendants obtained control of said Company and after they caused themselves to be elected as the majority of the Board of Directors and as officers of the said Company, the maximum salaries of the said individual defendants for the years after said defendants obtained control would have been substantially as follows:

Year Ending	William C. Schmidt	Carl Oscar Schmidt, Jr.
March 31, 1947	$ 3,900.00	$3,900.00
March 31, 1948	3,900.00	3,900.00
March 31, 1949	5,961.75	5,961.75
March 31, 1950	3,900.00	3,900.00
March 31, 1951	10,085.25	10,085.25
March 31, 1952	10,085.25	10,085.25

9. Said individual defendants obtained control as aforesaid when said Salary Dividend Plan was in effect and when the defendant Company had unfilled orders at delivered prices of approximately between one and a half million and two million dollars, and had inventory on hand which had been produced at earlier and substantially lower costs. The individual defendants have operated the said Company without substantially increasing the physical volume of production, although the dollar volume has increased by reason of increases in prices and price levels.

Notwithstanding the foregoing and in furtherance of said combination and plan, said individual defendants caused their salaries to be increased, and the dividends paid to shareholders to be changed, as follows:

Year Ending	Annual Salary Received, Wm. C. Schmidt	Annual Salary Received, C. Oscar Schmidt	Dividends Per Share
Mar. 31, 1946	(a) $10,192.00	(b) $10,192.00	$4.50
Mar. 31, 1947	20,000.00	20,000.00	1.50
Mar. 31, 1948	(c) 22,000.00	20,000.00	1.50
Mar. 31, 1949	20,000.00	20,000.00	3.00
Mar. 31, 1950	20,000.00	20,000.00	1.50
Mar. 31, 1951	26,000.00	28,000.00	6.00
Mar. 31, 1952	26,000.00	28,000.00	6.00

(a) Salary of William C. Schmidt $10,192.00 included a bonus which was in excess of the bonus which should have been paid according to said Salary Dividend Plan.

(b) Salary of C. Oscar Schmidt $10,192.00 was the annual rate, including bonus at which rate he was paid for thirty-eight (38) weeks for a total of $7,248.00.

(a) and (b) Salaries of William C. Schmidt and C. Oscar Schmidt were figured on the same basis the salary of the President, Herman Schmidt. Salaries for the year were determined on March 30, 1946.

(c) Salary of William C. Schmidt was increased from $20,000.00 to $22,000.00 for the year ending March 31, 1948; the extra $2,000.00 compensation was paid him for an alleged improvement of rendering equipment which was not adequately defined at the time his salary was fixed by the majority Directors and has not been explained adequately since.

10. As a further part of said combination and plan, the said individual defendants held a meeting of the Board of Directors of said Company on September 27, 1952, at which the only other Director of the said Company was not present, and proceeded to vote for increases in their salaries, as follows:

To William C. Schmidt, to $32,500.00 per year,
To C. Oscar Schmidt, Jr., to $35,000.00 per year,
subject to the approval by the office of Salary Stabilization.

No notice of the said increase was given to the minority member of the Board of Directors. He did not learn of the same until October 25, 1952, and immediately protested

the said voted increased salaries, and said increases have not to date been approved by the Office of Salary Stabilization.

11. As a further part of said combination and plan, the said individual defendants caused the Board of Directors of the corporation to be reorganized and the number of Directors to be reduced, and have deprived the minority stockholders of sufficient representation to permit the seconding of motions on behalf of the minority and have thereby prevented motions to obtain proper dividends to be recorded in the minutes of the Board of Directors.

For many years prior to the annual meeting of the shareholders of said Corporation held in April, 1946, the number of Directors of the defendant Company had been fixed at not more than ten (10), and the number of Directors elected each year was approximately ten (10). Said individual defendants, at the annual meeting in April, 1946, caused the number of Directors to be reduced to five (5).

Prior to the holding of the annual meeting for the year 1951 the minority stockholders of the defendant Company, including the plaintiffs, joined in proxies to one minority stockholder and gave notice of cumulative voting, as provided by the laws of the State of Ohio. Said minority stockholders and the shares represented at the said meeting would have been entitled to elect on the basis of the number of shares represented by them, at least two of the said five Directors. Without prior notice to any of the minority shareholders and over their protest, the said individual defendants, by their control of the majority of the shares of said Corporation, purported to cause an amendment of the By-Laws of the said defendant Company to be adopted, changing the number of Directors from five (5) to three (3), and proceeded to elect the said in-

dividual defendants two of the said three Directors and elected Herman Schmidt as the third Director. Said Herman Schmidt, as the proxy of the minority shareholders protested the legality of the said action, but the said defendants have nevertheless continued to enforce said purported change in the regulations of the defendant Company.

12. Plaintiffs are informed that the individual defendants, profiting from said combination and plan, entered into an agreement or arrangement for the purchase of one hundred and fifty (150) shares of defendant Company from a stockholder at a time when the book value of said stock was in excess of Two Hundred ($200.00) Dollars per share and the real value was in excess of said amount, and that by reason of the aforesaid combination and plan, including said dividend policy, purchased said one hundred and fifty (150) shares at Fifty ($50.00) Dollars per share.

13. Plaintiffs are informed that as a part of another arrangement for the purchase or control of stock of the defendant Company, the individual defendants or someone allied with or acting for them is required to continue to pay to a former stockholder the dividends on shares of stock transferred to the individual defendants or someone allied with them, and that thereby said individual defendants have acquired, contrary to the interests of the other stockholders, additional motives and reasons for depressing the dividends paid by the said Corporation.

14. The defendant Company, during the five (5) years preceding March 31, 1946 earned a total after taxes of $222,230.84 and paid out in dividends during said period a total of $166,920.00, or an average of 75.11% of the earnings after taxes during said period. As a part of said combination and plan of the individual defendants and pursuant thereto the individual defendants herein have

caused the profits of the said Company to be diverted and wrongfully withheld from the payment of dividends and have reduced the percentage of dividends to earnings, as shown by the following tabulation:

Year Ending	Earnings	Dividends Paid	Earnings Per Share	Dividends Per Share	Percent of Dividends to Earnings
3/31/47	$118,199.47	$8247.00	$21.50	$1.50	6.98%
3/31/48	279,576.07	8247.00	50.85	1.50	2.95%
3/31/49	214,252.93	16494.00	38.97	3.00	7.70%
3/31/50	7,976.61	8247.00	1.45	1.50	3.40%
				Above earnings)	
3/31/51	147,879.54	32988.00	26.89	6.00	22.3%
3/31/52	134,636.36	32988.00	24.49	6.00	24.5%
For Six Years Ending 3/31/52	$902,520.98	$107211.00	$164.15	$19.50	11.87%

15. The defendant Company was organized in 1895, and having operated successfully since said date over periods of prosperity, as well as periods of depression in business, accumulated considerable experience as to needed inventories, and the ratio of needed inventories to sales. For the five (5) years prior to the assumption of control by the individual defendants the ratio of defendant Company's inventory to sales averaged from 26.352% to 38.508%, or a mean average of 32.12% to sales over said period. The individual defendants as part of their said combination and plan have unreasonably and improperly accumulated inventory beyond the reasonable needs of the business. Notwithstanding that the percentage of inventory to average sales for the year 1942 and 1943 amounted to 33.281%

of the sales, and that said percentage would still be adequate for defendant Company's continued operations, the defendants wrongfully and without regard to the needs of the business have increased the percentage of inventory to sales as follows:

For the year ending March 31, 1947 to 35.773%
For the year ending March 31, 1948 to 38.775%
For the year ending March 31, 1949 to 53.647%
For the year ending March 31, 1950 to 60.409%
For the year ending March 31, 1951 to 44.507%
For the year ending March 31, 1952 to 53.897%

Said defendants for the periods through September 13, 1952, on the available figures, have further increased the percentage of inventory to sales to 65.65%.

16. As a further part of said combination and plan and in order to wrongfully prevent the payment of reasonable dividends, the individual defendants have increased the ratio of current assets to current liabilities of said defendant Company, as shown by the following table:

Ratio on March 31, 1944 — 2.94
Ratio on March 31, 1945 — 2.49
Ratio on March 31, 1946 — 2.43
Ratio on March 31, 1947 — 1.88
Ratio on March 31, 1948 — 2.31
Ratio on March 31, 1949 — 3.13
Ratio on March 31, 1950 — 3.91
Ratio on March 31, 1951 — 3.49
Ratio on March 31, 1952 — 3.70
Ratio on September 13, 1952 — 4.17

The experience of a company in a similar line of business indicates that a reasonable ratio of current assets to current liabilities would be 1.66 and industries of comparable

size in the United States show a ratio of current assets to current liabilities of 1.92.

17. Based on a tentative statement, as of January 3, 1953 the earnings after taxes of the said defendant Company for the period from March 31, 1952 through January 3, 1953 were $101,144.99. The defendants during said period have paid dividends totalling $32,988.00 or Six ($6.00) Dollars per share. As of January 3, 1953 the current assets of the Company were $1,585,185.47, the current liabilities $364,451.30, the capital account $549,800.00, capital surplus $34,968.00 and the earned surplus $782,-982.26 plus $150,000.00 shown as a reserve but which actually is earned surplus, making the total earned surplus $932,982.26.

18. In furtherance of said combination and plan the said defendants have caused an investment to be made by defendant Company in a rendering concern, said investment being in the amount of Five Thousand Five Hundred ($5,500.00) Dollars, and have extended credit to the said rendering concern in the approximate amount of Sixty Thousand ($60,000.00) Dollars, of which Thirty-eight Thousand ($38,000.00) Dollars still remains due. Said investment improperly and wrongfully made also has contributed to the unreasonably low dividends payable to the shareholders of the said defendant Company.

19. On or about May 15, 1952 plaintiffs made written demand upon and to the said individual defendants and the defendant Company that proper dividends be declared. Plaintiffs pointed out that the earnings of the said defendant Company since the assumption of management by the said individual defendants were at least the sum of $923,-000.00, that the total dividends declared in that period amounted to $107,211.00, or $19.50 per share; that the then book value of the stock was $267.00 per share; that the

minority member of the Board of Directors had offered on January 19, 1952 a resolution calling for a dividend of $61.00 per share, plus the sum of an amount equal to 70% of the total sum of the "Increase in Surplus" and of the "Dividends paid" since October 15, 1950, less the deduction of "Dividends paid" from the said 70% of the total sum, divided by the number of shares outstanding. Plaintiffs notified the said defendants that the failure to declare proper dividends was due to an abuse of discretion, and that the control of the defendants was being used contrary to the requirements and needs of the said corporation and the duties owed to its stockholders. These plaintiffs demanded that:

(1) Said defendants avoid making The Cincinnati Butchers' Supply Company subject to the tax imposed by Section 102 of the Internal Revenue Code of the United States, and that said corporation be not availed of to prevent the imposition of the surtax provided by the Internal Revenue Code of the United States upon the majority of shareholders of said corporation through the medium of permitting earnings of profits to accumulate instead of being distributed, or by permitting the profits of the corporation to accumulate beyond the reasonable needs of the business.

(2) That the said defendants cause to be called a special meeting of the Board of Directors of said corporation for the purpose of adopting a resolution declaring an adequate and proper dividend as required by law in the performance of their duties.

(3) That the amount of said dividend be in the sum of $61.00 per share, plus the sum of an amount equal to 70% of the total sum of the "Increase in Surplus" and of the "Dividends paid", both since October 15,

1950, less the deduction of said "Dividends paid" from the said 70% of said total sum, dividing the resulting balance by the number of outstanding shares, or

(4) That said defendants declare such larger or smaller dividends as are required by law and their duties in the operation of said corporation in order to conform with the obligations imposed by law.

(5) That the defendants vote in favor of a declaration of dividends in accordance with the above.

(6) That defendants cause the annual meeting of said Corporation to be duly called and held.

(7) That the defendants take such other and further action as required by law for the management of the said The Cincinnati Butchers' Supply Company, without animosity or discrimination towards its minority shareholders.

20. Dividends thus far declared by defendants Company for the year 1952 in the amount of Six ($6.00) Dollars per share, are totally inadequate and below the amount required in the exercise of the sound discretion and by law, and are below what they should be except for said wrongful combination and plan. At least $450,836.00 of the surplus of said defendant Company, or Eighty-two ($82.00) Dollars per share, is not needed for the proper conduct of said defendant's business. The individual defendants in the abuse of discretion as the majority of the Directors of said defendant Company and in furtherance of said combination and plan have failed to vote to declare or pay additional dividends of Eighty-two ($82.00) Dollars per share out of said unneeded surplus.

21. Pursuant to the regulations under Section 102 of the Internal Revenue Code of the United States the Treas-

ury Department has instructed Collectors of Internal Revenue that corporations which have not distributed at least seventy (70%) percent of their earnings as taxable dividends should be given close attention to determine whether Section 102 of the Internal Revenue Code is applicable. The dividends declared by defendant Company are unjustifiably below seventy (70%) percent of earnings for the current year, and the said actions of the defendants further endanger the surplus of the Company and threaten to render it subject to the imposition of the surtax under Section 102 of the Internal Revenue Code, as aforesaid.

22. The said individual defendants, pursuant to said wrongful combination and plan, have thwarted the efforts of the minority Director to cause a dividend of Eighty-two ($82.00) Dollars to be declared by defendant Company. The minority Director introduced a motion for the payment of dividends as requested by these plaintiffs and is ready, able and willing to vote in favor of the declaration by defendant Company of a dividend of Eighty-two ($82.00) Dollars per share.

WHEREFORE, plaintiffs pray that the Court may enter an order, decree and judgment directed to the said defendants, William C. Schmidt and Carl Oscar Schmidt, Jr., also known as C. Oscar Schmidt, Jr., as the majority of the Board of Directors of defendant Company, ordering and commanding that they forthwith cause a meeting of the Board of defendant Company to be called and held, that they take immediate steps for the declaration of a dividend by said defendant Company of Eighty-two ($82.00) Dollars per share, payable over a reasonable period and vote as said Directors in favor thereof; that the individual defendants cease and desist from the aforesaid combination and plan and the diverting of the profits of said defendant Company as aforesaid; that said defendant Company shall pay

such dividends as ordered by the Board of Directors pursuant to the judgment and decree of this Court, and for such other and further relief as may be equitable and proper in the premises.

MAGRISH & MAGRISH
JAMES L. MAGRISH
Attorneys for Plaintiffs,
921 Dixie Terminal Bldg.,
Cincinnati 2, Ohio.

STATE OF INDIANA, COUNTY OF LA PORTE, SS:

Helene I. Pfeifer, being first duly sworn, states that she is one of the plaintiffs herein and that the facts stated in the foregoing complaint are on information and belief true as she verily believes.

Helene I. Pfeifer

Sworn to before me and subscribed in my presence this 18th day of February, 1953.

Mary B. Lineberry, Notary Public.
My commission expires 4/9/56.

STATE OF WASHINGTON, COUNTY OF PIERCE, SS:

Charlotte F. Morgan, being first duly sworn, states that she is one of the plaintiffs herein and that the facts stated in the foregoing complaint are on information and belief true as she verily believes.

Charlotte F. Morgan

Sworn to before me and subscribed in my presence this 13th day of February, 1953.

W. L. Duest, Notary Public.

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, SS:

Arthur R. Michel, being first duly sworn, states that he is one of the plaintiffs herein and that the facts stated in the foregoing complaint are on information and belief true as he verily believes.

Arthur R. Michel

Sworn to before me and subscribed in my presence this 7th day of February, 1953.

Walter R. Smith, Notary Public.
My commission expires June 14, 1954.

MOTION TO DISMISS

Come now defendants and move the Court for an order dismissing the Complaint herein, or in the alternative, for summary judgment in favor of the defendants on the following grounds, to-wit:

1) The plaintiffs set forth that they are a minority of the stockholders. This is a type of action which appears to be representative in nature, and undertakes to make a claim for the plaintiffs as well as for the benefit of other stockholders who are residents within the State of Ohio. Under such circumstances, there is no diversity of citizenship between the plaintiffs and the class of stockholders, a number of whom are residents of Ohio, with the defendant corporation, and individuals who are residents of Ohio.

2) The Complaint, on its face, shows that it does not set forth a cause of action arising out of any Federal Law, nor a cause of action over which jurisdiction is specifically lodged in the United States District Court by any act of Congress.

We respectfully submit that the Complaint should be dismissed, or in the alternative, that summary judgment be granted for the defendants.

SOL GOODMAN,
Attorney for Defendants,
1016 Union Trust Bldg.,
Cincinnati 2, Ohio.

AFFIDAVIT OF WILLIAM C. SCHMIDT

Comes now William C. Schmidt and after being first duly sworn states that he is secretary of the Cincinnati Butchers' Supply Company.

Said affiant further states that there is attached hereto a true and correct list of all shareholders of said corporation, together with their places of residence.

Further affiant sayeth naught.

/s/ WILLIAM C. SCHMIDT

Sworn to before me and subscribed in my presence this 16th day of March, 1953.

Sol Goodman, Notary Public.

STOCKHOLDERS OF CINCINNATI BUTCHERS' SUPPLY COMPANY AS OF MARCH 16, 1953

Albert J. Apfel
3336 Vine Street
Cincinnati 20, Ohio

Estate of Mrs. Ethel D. Beck
1629 Elkton Place
Cincinnati 24, Ohio

The Dupps Co.
Germantown, Ohio

The Fifth-Third Union Trust Co.
4th & Walnut
Attention: Trust Office — Mr. Biggs
Cincinnati 2, Ohio

Mrs. Charlotte Marquardt
3739 Hazel Avenue
Norwood 12, Ohio

Mr. Arthur R. Michel
9714 Burnet Avenue
San Fernando, California

Mrs. Charlotte A. Morgan
Seattle, Washington

Mrs. Helene S. Pfeifer
R. R. 2, Box 131-A
New Carlisle, Indiana

Rose Riebow
5716 Belmont Avenue
Cincinnati 24, Ohio

C. Oscar Schmidt
405 Meadow Lane
Wyoming 15, Ohio

Mrs. Charlotte A. Schmidt
5716 Belmont Avenue
Cincinnati 24, Ohio

Mr. Gustav E. Schmidt
8071 Colette Lane
Finneytown
Cincinnati 31, Ohio

Mr. Herman C. Schmidt
39 Erkenbrecher Ave.
Cincinnati 20, Ohio

Mathilde A. Schmidt
2692 Stratford Ave.
Cincinnati 20, Ohio

William C. Schmidt
1049 North Bend Road
College Hill
Cincinnati 24, Ohio

Emma Stothfang
1622 Peaslee Ave.
Cincinnati 24, Ohio

Fred W. Stothfang
1622 Peaslee Ave.
Cincinnati 24, Ohio

ENTRY OVERRULING DEFENDANTS' MOTION TO DISMISS COMPLAINT

This cause came on to be heard upon the Motion of the defendants to dismiss the Complaint herein, or, in the alternative, for Summary Judgment in favor of the defendants, and was submitted to the Court. Upon consideration thereof, the Court being fully advised, finds that the said Motion of the defendants is not well taken and the said Motion hereby is overruled, to all of which the defendants except.

Defendants hereby are granted twenty (20) days to file an answer herein.

August 12, 1953.

Druffel, J.

O.K. Magrish & Magrish
James L. Magrish
Attorneys for Pltfs.

Have Seen
Sol Goodman
Attorney for Defts.

NOTICE OF APPEAL BY DEFENDANTS

The Defendants, the Cincinnati Butchers' Supply Company, C. Oscar Schmidt, Jr. and William Schmidt, hereby give their notice of appeal to the Court of Appeals for the Sixth Circuit from the decision and judgment of the United States District Court entered in the within cause on Aug. 12th, 1953, wherein the Court entered judgment overruling the Defendants' motion to dismiss complaint.

SOL GOODMAN,
Attorney for Defendants.

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES COURT OF APPEALS

For The Sixth Circuit

No. 12052

HELENE I. PFEIFER, Box 131, R. R. 2, New Carlisle, Indiana,
CHARLOTTE F. MORGAN, c/o Captain Cullen B. Morgan, McCord Air Force Base, Tacoma, Washington,
ARTHUR R. MICHEL, 9714 Burnet Avenue, San Fernando, California,
Plaintiffs-Appellees,

vs.

THE CINCINNATI BUTCHERS' SUPPLY COMPANY, a corporation organized and existing under the laws of the State of Ohio, Elmwood Place, Ohio,
WILLIAM C. SCHMIDT, 1049 North Bend Road, Cincinnati, Ohio,
CARL OSCAR SCHMIDT, JR., also known as C. Oscar Schmidt, Jr., 405 Meadow Lane, Wyoming, Ohio,
Defendants-Appellants.

MOTION TO DISMISS THE APPEAL

(Filed October 1, 1953.)

Now comes Helene I. Pfeifer, Charlotte F. Morgan and Arthur R. Michel, appellees herein, by their Attorneys, and move the Court to dismiss the Appeal by the Defendants-Appellants herein, from the decision and judgment of the United States District Court entered in the within cause on August 12, 1953. The said Defendants-Appellants

on September 4, 1953 filed in the District Court of the United States, Southern District of Ohio, Western Division their Notice of Appeal to the United States Circuit Court of Appeals for the Sixth Circuit from said decision and judgment of the District Court.

The decision and judgment of the United States District Court referred to in Defendants-Appellants' Notice of Appeal was an order overruling the defendants' motion to dismiss the Complaint and/or for summary judgment. Such an order is not one of the "final decisions of the District Court of the United States * * *" from which appeals may be filed to a United States Circuit Court of Appeals under the applicable statute, to-wit: 28 U.S.C. Sec. 1291. The authorities and arguments in support of this motion are set forth in a Memorandum filed herewith.

MAGRISH & MAGRISH
/s/JAMES L. MAGRISH
/s/ MORSE JOHNSON
Attorneys for Plaintiffs-Appellees

ORDER

(Filed October 23, 1953.)

Before SIMONS, Chief Judge; ALLEN and MARTIN, Circuit Judges.

PER CURIAM. This is a motion to dismiss the appeal because of lack of jurisdiction in this court to entertain it. The appellees, defendants in the court below, moved to dismiss the action there filed on the ground that Federal jurisdiction was lacking because there was no diversity of citizenship between the parties and that the complaint did not set forth a cause of action arising under Federal law. Their motion to dismiss was overruled and they appealed to this court to set aside the order of denial.

It is elementary that a judgment to be appealable must be a final judgment except those cases where by statute appeals are permitted from interlocutory orders, *Jones* v. *St. Paul Fire and Marine Insurance Company,* 108 Fed. 2d, 123, 125, *Cusano* v. *St. Louis Shuffleboard Company,* 194 Fed. 2d, 986, 987 (C.A. 8), *Southeastern Greyhound Lines* v. *McCafferty,* 169 Fed. 2d, 1, 3. The fact that the motion to dismiss is based upon jurisdictional ground does not create an exception, *Catlin v. United States,* 324 U. S. 229, 236, nor does this case involve a collateral issue or a separate claim which may have finality as a collateral issue to the main case, neither can it be assimilated to an injunction under the provisions of 28 U.S.C.A. Sec. 1292 (1). We have no jurisdiction to entertain this appeal.

The appellants' suggestion that the court should hold this motion for a hearing upon the merits will serve no useful purpose. If after trial below the appellants appeal from an adverse judgment, they may, of course, raise all appropriate issues in support of their appeal.

The appeal is dismissed.

ENTER:
/s/ CHARLES C. SIMONS, J.

PETITION FOR REHEARING
(Filed November 3, 1953.)

The Defendants-Appellants respectfully petition the Court for a rehearing and further consideration of its Order dismissing the Appeal.

/s/ SOL GOODMAN
1016 Union Trust Bldg.
Cincinnati 2, Ohio
Attorney for Defendants-Appellants

ORDER

(Filed November 23, 1953.)

Upon consideration of a petition for rehearing upon our order of October 23, 1953 dismissing the appeal in the above cause,

IT IS HEREBY ORDERED that said petition be, and it is hereby, Denied.

Approved for entry:

CHARLES C. SIMONS
Chief Judge

CERTIFICATE OF CLERK

I, Carl W. Reuss, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing are true and correct copies of:

Motion of Appellees to Dismiss Appeal, filed Oct. 1, 1953
Order Dismissing Appeal, filed October 23, 1953
Petition for Rehearing, filed November 3, 1953
Order denying Rehearing, filed November 23, 1953

in the case of The Cincinnati Butchers' Supply Company, et al. vs. Helene I. Pfeifer, et al., No. 12,052, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 8th day of December, 1953.

CARL W. REUSS
Clerk of the United States Court
of Appeals for the Sixth Circuit

(SEAL)

14

No. 507

Office - Supreme Court, U. S.
FILED
DEC 24 1953
HAROLD B. WILLEY, Clerk

October 1953

United States Supreme Court

THE CINCINNATI BUTCHERS' SUPPLY COMPANY, WILLIAM C. SCHMIDT, and CARL OSCAR SCHMIDT, Jr., also known as C. OSCAR SCHMIDT, Jr.,

Petitioners,

vs.

HELENE I. PFEIFER, CHARLOTTE F. MORGAN, and ARTHUR R. MITCHELL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF PETITIONERS IN SUPPORT THEREOF

SOL GOODMAN,
1016 Union Trust Building,
Cincinnati, Ohio,
Attorney for Defendants-Appellants.

COURT INDEX PRESS, INC. — Law Printers — 909 Walnut St., Cincinnati, O.

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UNITED STATES SUPREME COURT

THE CINCINNATI BUTCHERS' SUPPLY COMPANY, WILLIAM C. SCHMIDT, and CARL OSCAR SCHMIDT, Jr., also known as C. OSCAR SCHMIDT, Jr.,,

Petitioners.

vs

HELENE I. PFEIFER, CHARLOTTE F. MORGAN, and ARTHUR R. MICHEL,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MAY IT PLEASE THE COURT:

The petition of The Cincinnati Butchers' Supply Company, a corporation under the laws of the State of Ohio and William C. Schmidt and C. Oscar Schmidt, Jr., respectively shows to this Honorable Court:

A

SUMMARY STATEMENT OF THE MATTERS INVOLVED

An action was instituted by stockholders living outside of Ohio, against an Ohio corporation and a majority of its members of the Board of Directors, seeking an order of Court to compel said majority of the Board of Directors to declare a dividend. The corporation and the individual defendants moved to dismiss and for summary judgment

on the ground that the District Court lacks jurisdiction to grant the relief sought where it is shown by affidavit that the relief requested is not only for the benefit of the Plaintiffs, non-resident of Ohio, but for many other stockholders who are resident of Ohio, and who are alligned in interest with the stockholders who brought the suit, and would share equally with them in any relief that might be granted.

B

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Court of Appeals for the Sixth Circuit decided a Federal question of substance in a manner contrary to the decisions of this Court in the cases of *Cohen* v. *Beneficial Industrial Loan Corporation, 337 U.S. 539; Swift* v. *Compania, Etc., 339 U.S. 684.*

2. The decision of the Court of Appeals for the Sixth Circuit is in conflict with the decision in the case of *Merkel Electric Products* v. *U.E., 202 Fed. 2d 435.*

3. Unless a decision is made by this Honorable Court upon the state of facts existing in the present cause, a great confusion will arise in the administration of the laws and the District Courts will be constantly clogged and harassed in the trial of litigation.

WHEREFORE, the petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals for the Sixth Circuit commanding that court to certify and to send to this Court for its review and determination, on a day therein named, a full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket No. 12052, The Cincinnati Butchers' Supply Co., C. Oscar Schmidt, Jr. and William C. Schmidt

v. Helene I. Pfeifer, Charlotte F. Morgan, and Arthur R. Michel, and that the said decision of the Court of Appeals for the Sixth Circuit rendered by it, October 23rd, 1953 and its order refusing an application for rehearing entered by it on November 23, 1953 may be reviewed by this Honorable Court, and that this petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

The Cincinnati Butchers' Supply Co., William C. Schmidt and Carl Oscar Schmidt, Jr. also known as C. Oscar Schmidt, Jr.,
Defendants-Appellants,

SOL GOODMAN,
Attorney for Defendants-Appellants

I

THE OPINIONS OF THE COURTS BELOW

The opinions of the United States District Court is set forth at page 6 hereinafter. The opinion of the Court of Appeals, Sixth Circuit is not reported and a copy is set forth at page post.

II

JURISDICTION

1. The jurisdiction of this Court to entertain a petition for a writ of certiorari and the allowance thereof is provided for in Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 statutes 937, particularly Section 237 (b) and 240 (a).

2. The date of the judgment and decree to be reviewed is October 23, 1953 at which time the Court of Appeals Sixth Circuit rendered its decision in Cause No. 12052, wherein it decided that Petitioner's appeal be dismissed. Petition for Rehearing was denied on November 23, 1953.

3. The ruling of the United States District Court affirmed by the Court of Appeals in effect holds that Respondent may bring an action against Petitioner Corporation and Petitioners individuals in a District Court of the United States, seeking the declaration of a dividend for the benefit of Respondents who are three of the stockholders, and some twelve other stockholders who are residents of Ohio. The jurisdiction of the Federal Court having been questioned, the Court of Appeals holding in effect requires the parties to expend a great deal of time, effort and money in the trial of a lengthy stockholders action prior to the adjudication as to whether or not jurisdiction exists in a Federal District Court to hear such cause.

The decision of the lower Courts seem to do violence to the spirit of Section 1291 and Section 1292 of Title 28, U.S. Code as construed and interpreted by this Court in the cases of *Cohen* v. *Beneficial Industrial Loan Corp., 337 U.S. 539;* and *Swift and Co.* v. *Compania, 339 U.S. 684.*

4. The jurisdiction of this Court is sustained by Rule 38, Section 5 (b).

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The action was instituted in the United States District Court for the Southern District of Ohio, Western Division as Cause No. 3116, and while the complaint was lengthy and alleged many things, it sought relief as shown by the prayer as follows:

> "Wherefore, the plaintiffs pray that the Court may enter an order * * * that meeting of the Board of Directors of defendant company be called and held, that they take immediate steps *for the declaration of a dividend* * * *".

To this Petition was filed a Motion to Dismiss and for Summary judgment and supported by an affidavit showing that the defendant corporation has some seventeen (17) stockholders, the three (3) plaintiffs being stockholders living *outside* of the State of Ohio. The corporation and the other stockholders, constituting with the plaintiffs, the *minority* as well as those named defendants and alleged to constitute the *majority,* are all residents *within* the State of Ohio.

It was the contention of the petitioners that *the interests of the plaintiffs, together with the interests of the minority stockholders, residents in Ohio, are identical,* and that the relief sought, being the declaration of a dividend, was relief sought for the plaintiffs as well as the other stockholders who are residents of Ohio, and that by reason thereof, the proper alignment of parties would place some twelve (12) other stockholders, residents of Ohio, along with the plain-

tiffs who are residents outside of Ohio, and therefore diversity of citizenship does not exist.

The Motion further contended that the facts as alleged, do not set up facts constituting a cause of action.

The District Judge rendered his opinion reading as follows:

> "Please be advised, after careful consideration of defendants' Motion that the Complaint herein should be dismissed, or in the alternative, that the summary judgment be granted for the defendants, the Court is of the opinion that the Motion is not well taken and the same is overruled.
>
> "An Entry may be presented accordingly with exceptions.
>
> "John H. Druffel, J."

ARGUMENT

I May an appeal be taken from the ruling on this Motion?

A ruling by the Court finding that the District Court lacks jurisdiction will dispose of all isues in the case. It will avoid an unnecessary lengthy trial that would normally be required in the hearing of this type of case on the merits. It is not a ruling on a mere objection, the error of which ruling could be preserved and reviewed after a final hearing on the merits. A proper ruling would dispose of the case and avoid the necessity of a hearing.

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 539:

1. Section 1291 of United States Code, Title 28, providing for appeal only "from all final decisions of the district courts," except when direct appeal to the Supreme Court of the United States is provided, and §1292 allowing ap-

peals also from certain interlocutory orders, decrees, and judgments, disallow appeal from any decision which is tentative, informal, or incomplete, and even from fully consummated decisions where they are but steps towards a final judgment in which they will merge, *but do not disallow an appeal from a decision which finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.*

2. An order of a Federal district court denying in a stockholders' derivative action the corporate defendant's motion to require the plaintiff to give security, as provided in a state statute dealing with such actions, is appealable, because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it, where the right to security presents a serious and unsettled question, and there is not merely involved an exercise of discretion as to the amount of security.

Merkel Electric Products v. *U.E.,* 202 F. 2d. 435:

1. Order denying union's motion to strike employer's suit for damages because of breach of collective bargaining agreement because employer had not referred dispute to arbitration as rquired by contract, was equivalent of the denial of an injunction, and was consequently appealable.

Swift & Co. v. *Compania Colombiana,* 339 U.S. 684, 19 ALR 2d. 630:

2. The statutory provision permitting appeals from final decisions only does not require that review of an order vacating a foreign attachment of a vessel made in a libel

in personam in admiralty be deferred until the whole case is adjudicated.

3. The statutory provision in 28 USC §1291 for appeals from final decisions only should not be so construed as to deny effective review of a claim fairly severable from the context of a larger litigious process.

II Does a Federal District Court Have Jurisdiction over this type of Action?

The next inquiry is if plaintiff has brought *a suit seeking the declaration of a dividend* which is to be distributed among all shareholders can such an action be brought in Ohio Federal Court when it is shown by affidavit filed therein that almost all of the stockholders except the plaintiffs are citizens and residents of Ohio? Clearly all those parties will equally benefit by the declaration and payment of the dividend. If they were properly joined as co-plaintiffs it would be apparent on the face of the petition that the action could not be sustained! Can this court sustain jurisdiction by closing its eyes to the fact that this is an action for a dividend for the benefit of numerous Ohio stockholders, and grant jurisdiction, simply because they have not been made parties?

In 28 U.S.C.A., Section 1401, it is provided:

> "Stockholders Derivative Action".
> "Any civil action by a stockholder on behalf of his corporation may be prosecuted in any judicial district where the corporation might have sued the same defendants".

If Section 1401 quoted above applies in this action, then the test to be applied is whether or not if the corporation brought this action against the Board of Directors to com-

pel them to take the action of declaring a dividend, could it have sued these defendants in this district? Clearly it could not because it is an Ohio corporation and the other defendants are citizens of Ohio.

Horwitz v. *Balaban, et al.,* 112 F. Supp. 99:

> "Stockholders' derivative and representative suits are both class actions in sense that plaintiff undertakes to represent stockholders not actually before court, and in both classes of suits, a successful result ultimately enures to benefit of all stockholders by reason of their ownership of the corporation."

Gordon v. *Elliman,* 116 N.Y.S. 2d 671:

The question presented on appeal was whether an action by a stockholder against a corporation and its directors to compel declaration of a dividend is one in the 'right' of the corporation requiring the plaintiff to give security for expenses of the action in accordance with the statute. Basically, the question was whether such a suit is a representative one in the personal right of stockholders or whether it is a derivative one in the right of the corporation.

This court stated that the weight of authority seems to favor the view that the action is derivative. An action may be for the benefit of stockholders and also may, at the same time, be for the benefit of the corporation. Plaintiff's position is that an unreasonable refusal to declare a dividend deprives the stockholders of a primary right to receive earnings and that the wrong is to the stockholders rather than to the corporation. The court held this view erroneous as the interests of the corporation and the entire group of stockholders as a body are identical. It is the

interests of the corporation which are involved and dividend policy is a matter in the interest of the body corporate and not the individual stockholder. The statute recognizes the fact that litigation initiated by an individual stockholder to challenge corporate policy may be an expensive one to the corporation. It therefore requires the giving of security to save the corporation possible useless expense. The order appealed from was affirmed.

Foster v. *Carlin,* 200 F. 2d 943:

> "To sustain jurisdiction of federal court on ground of 'diversity of citizenship' there must exist an actual, substantial controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side."

Tucker v. *National Linen Service Corp.,* 200 Fed. 2d. 868:

> "In so far as stockholders' derivative suit sought equitable relief of cancellation and its incident an account as to certificates of stock standing in names of persons who were not, and could not be made parties to the suit without destroying diversity jurisdiction, Federal District Court was clearly right in dismissing action for want of indispensable parties."

In the case of *Tucker* v. *National Linen Service Corp.,* 92 Fed. Supp. 502, the rule is set forth that Federal jurisdiction is lacking if any indispensable defendant is a citizen of the same state as any plaintiff.

In the present action, the plaintiffs, while citizens of several states other than Ohio are in effect bringing a class action for the benefit of themselves and other minority shareholders, except the two residents of Ohio who are specifically named as constituting a majority of the Board

of Directors. By affidavit filed in this action. it is indicated that a great number of the shareholders who are in the minority group with the plaintiffs, are residents of Ohio. Their interests being aligned with plaintiffs, places these shareholders who are in the minority, and residents of Ohio, in an action against the defendants, who are residents of Ohio. Under such circumstnaces jurisdiction is definitely lacking in a Federal Court.

In the case of *Lavin* v. *Lavin,* 182 F. 2d 870, 18 ALR 2d, 1017, the rule is set forth that in a derivative action by a stockholder it is essential that the pleadings indicate that there is diversity of citizenship between the stockholder group represented by the plaintiff, and the corporation and majority directors or stockholders named as defendants.

The Court held in the case of *Schuckman* v. *Rubenstein,* 164 F. 2d 952 at page 955 as follows:

> "Upon the issue so raised the burden of proof rested upon the appellant, which burden was not met. It was not only incumbent upon the appellant to properly allege the necessary jurisdictional facts but where the jurisdictional issue was raised to also prove their existence in order to maintain the action. McNutt v. General Motor Acceptance Corp., 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 1135; KVOS, Inc. v. Associated Press, 299 U. S. 269, 57 S. Ct. 197, 81 L. Ed. 183; Thomson v. Gaskill, 315 U. S. 442, 62 S. Ct. 673, 86 L. Ed. 951. It is well settled that when federal jurisdiction is grounded on diversity of citizenship such diversity of citizenship must exist between all the plaintiffs on the one hand and all the defendants on the other. Indianapolis v. Chase National Bank, 314 U. S. 63, 62 S. Ct. 15, 86 L. Ed. 47. If one of the defendants is an indispensable party to the action, and his joinder in the suit destroys diversity of citizenship, he must nevertheless be joined as a party with the resulting loss of juris-

diction by the trial court. Baltimore & Ohio R. v. Parkersburg, 268 U. S. 35, 45 S. Ct. 382, 69 L. Ed. 834. Even where a defendant, being a citizen of the same state of which one of the plaintiffs is also a citizen is not an indispensable party, but nevertheless a proper party, his joinder as a defendant by the plaintiff destroys the necessary diversity of citizenship."

We also direct the Court's attention to the recent decision in the case of *Gray* v. *Reuther Et. Al.*, 201 F. 2d, page 54, where the Court in the opinion states:

> "And for the further reason that the local union, which was not joined as a party to the suit, is an indispensable party; and if joined as a party defendant such joining would result in defeating jurisdiction for lack of diversity of citizenship."

III The Complaint does not state a cause of action.

It is well settled that the matter of declaring or not declaring dividends is one within the sound discretion of the Board of Directors of the corporation and that a Court of Equity will not ordinarily disturb the action of the Board or attempt to substitute its judgment for that of the Directors. This rule is stated in *11 Fletcher, Cyclopedia of Corporations,* at page 799:

> "It is within the discretion of the directors whether or not dividends shall be declared and paid, and a court will not interfere unless bad faith, abuse of discretion or dishonesty can be shown on their part."

And again at page 801:

> "But it is a well settled principle that whether or not dividends shall be paid, and the amount of

> the dividend at any time is primarity to be determined by the directors, and there must be bad faith or a clear abuse in discretion on their part to justify a court of equity in interfering; accordingly unless fraud, bad faith or dishonesty on the part of directors can be shown their judgment in withholding a dividend from the stockholders will be regarded as conclusive, unless they are controlled or limited by statute, charter, by-law, or vote of the stockholders, because it is a matter of internal management with which the courts will not ordinarily interfere."

The Corporation Act of Ohio in (R.C. Section 8623-21) provides that all shares of stock shall "be in all respects equal to every other share of the same class."

(R.C. Section 8623-38) provides for dividends and Section 8623-55 vests all of the authority in the operation of the business of the corporation and the declaration of dividends in the Board of Directors.

In *10 Ohio Jur. Section 351, page 479,* the rule is set forth that the directors have discretion in declaring dividends and provides that *a dividend must be a pro rata division among all stockholders of the same class.* The next section 352 clearly provides that the Board of Directors have discretion in whether or not the profits of the corporation shall be distributed as dividends or carried in a surplus account.

In *13 American Jurisprudence Section 680,* the rule is set forth that *all stockholders of the same class must receive dividends in the same amount based upon the shares held by them.* It cannot be questioned but that the declaration of a dividend is a distribution pro rata among all shareholders in accordance with the number of shares held by each. The corporation could not and this court will not order the directors to pay a dividend to the

plaintiffs. *A dividend when declared is to be paid to all shareholders.*

IV. The Allegation that the defendants are violating Section 102 of the Internal Revenue Code does not give the District Court jurisdiction.

We direct the Court's attention to the case of *Downing* v. *Howard,* 162 Fed. 2d, 654. In this action, stockholders of a corporation brought suits charging the officers and directors with violating the "Public Utility Holding Company Act" which had been enacted by Congress of 1935 (15 U. S. C. A., Section 79, et seq.). In this case the Court held that the action did not lie. In Syl. 4, the Court stated that alleged fact that the defendant directors failed to file with Securities and Exchange Commission a voluntary plan for reorganization of the utility as permitted by the Public Utility Holding Company Act, did not furnish a basis for a cause of action within jurisdiction of the Federal Court, in absence of diversity of citizenship. In Syl. 5 the Court stated: "A statute breaker is civilally liable only if his law violation causes another harm of the sort which it was the presumed intention of Legislature to protect against and the injury occurred in the way prescribed by statute."

CONCLUSION

It is contended by the petitioners that this type of action cannot be entertained in a District Court by reason of the lack of diversity of citizenship and by reason of the fact that no substantial Federal question is involved. It is further contended that the allegations contained in the Petition do not set forth a cause of action authorizing a District Court to interfere with the discre-

tion of the Board of Directors, elected by a majority of the stockholders, to declare a dividend.

We respectfully submit that this case involves an appeal from the ruling of the District Court refusing a Motion to Dismiss and for summary judgment, and that the "rights asserted in the action are too important to be denied review and too independent of the cause itself to require that Appellate consideration be deferred until the whole case is adjudicated." (*Cohen* v. *Loan Corp.*, 337 U. S. 539).

We submit that the claim of Petitioners that the District Court lacks jurisdiction should not be denied review because it is a claim "fairly severable from the contacts of a larger litigious process" (*Swift* & *Co.* v. *Columbiana,* 19 ALR 2d 630).

We respectfully submit that a reading of the Complaint, the Motion to Dismiss and the affidavit filed therewith will clearly convince the Court that this is an action wherein plaintiffs have aligned with them a number of Ohio stockholders, the relief sought by plaintiffs is not only for themselves but also for the Ohio stockholders, and that upon the face of the Complaint as well as the affidavit between the parties plaintiffs and parties defendants, there does not exist a diversity of citizenship, and thus deprives the District Court of jurisdiction.

We respectfully submit that upon the grounds outlined above, this Appeal should be entertained by this Court, and the action of the lower court reviewed, and finally reversed, and a decision entered ordering the dismissal of the Complaint.

SOL. GOODMAN
1016 Union Trust Building
Cincinnati, Ohio.
Attorney for Defendants-Appellants

December, 1953

15

Office - Supreme Court, U. S.
FILED
JAN 21 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER, 1953

No. 507

THE CINCINNATI BUTCHERS' SUPPLY COMPANY, WILLIAM C. SCHMIDT, and CARL OSCAR SCHMIDT, JR., also known as C. OSCAR SCHMIDT, JR.,

Petitioners,

v.

HELENE I. PFEIFER, CHARLOTTE F. MORGAN, and ARTHUR R. MICHEL,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

James L. Magner,
921 Dixie Terminal Building,
Cincinnati, Ohio,
Attorney for Respondents.

Morris Johnson,
921 Dixie Terminal Building,
Cincinnati, Ohio,
Of Counsel.

The Johnson & Hardin Co., Law Printers
Cincinnati, Ohio

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IN THE

Supreme Court of the United States

OCTOBER, 1953

No. 507

THE CINCINNATI BUTCHERS' SUPPLY COMPANY, WILLIAM C. SCHMIDT, and CARL OSCAR SCHMIDT, JR., also known as C. OSCAR SCHMIDT, JR.,

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HELENE I. PFEIFER, CHARLOTTE F. MORGAN, and ARTHUR R. MICHEL,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

A. OPINIONS BELOW

The United States District Court did not file an opinion with its order overruling the Motion to Dismiss and/or for Summary Judgment. A copy of the Court's letters to counsel advising them of the decision is set forth at Page 6 of the Petition and Brief of the Petitioners. By a per curiam order filed October 23, 1953, the Court of Appeals for the Sixth Circuit dismissed the appeal. This order has not yet been reported. It is set forth at Page 24

of the Transcript herein. By an order filed November 23, 1953, the Court of Appeals denied the petition for rehearing. This order has not yet been reported. It is set forth at Page 26 of the Transcript herein.

B. JURISDICTION

Petitioners have asserted (Petition and Brief, Page 3) that the jurisdiction of this Court is provided for in "Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 Statutes 937, particularly Section 237(b) and 240(a)." Respondents assume that Petitioners intend thereby to invoke the jurisdiction of this Court under Title 28 U. S. C. Secs. 1254 and 2101(c).

Petitioners have asserted (Petition and Brief, page 4) that "The jurisdiction of this Court is sustained by Rule 38, Section 5(b)." We submit such assertion is in error as Rule 38, Section 5(b) of the Rules of the Supreme Court does not relate to the Court's jurisdiction.

C. STATEMENT OF THE CASE

The statement of the case as set out by Petitioners (Petition and Brief, Pages 5-6) is their position regarding the case as presented to the District Court. It is not a statement of the issue which was before the Court of Appeals and now is before this Court. In fact, we respectfully submit, nowhere in Petitioners' "Statement of the Case" is there a statement of the only issue now before this Court.

The facts are that a Complaint was filed in the United States District Court for the Southern District of Ohio, Western Division, as Cause No. 3116, on February 26, 1953 by stockholders against a corporation and a majority of its Directors for dividends alleged to have been withheld not in good faith and by reason of a wrongful combination and plan by the majority stockholders. Without answering, the Petitioners filed a Motion to Dismiss and/or for Summary

Judgment. By Entry filed August 12, 1953, the District Court overruled this Motion and granted the Petitioners twenty (20) days within which to file an answer. After the expiration of said twenty (20) days and thus while in default for answer, the Petitioners on September 4, 1953 gave notice of appeal to the Court of Appeals for the Sixth Circuit. The Respondents docketed the appeal and moved to dismiss the same on the ground that the Court of Appeals was without jurisdiction since the attempted appeal was not from a "final decision" (28 U. S. C. Sec. 1291). On October 23, 1953 the Court of Appeals dismissed the appeal and on November 23, 1953 the Court of Appeals denied Petitioners' petition for a rehearing.

The only question, we submit, which can be raised by Petitioners is:

> "Is an order by a United States District Court overruling a Motion to Dismiss a Complaint filed by stockholders against a corporation, and its Directors, for dividends alleged to have been withheld not in good faith and by reason of a wrongful combination and plan by the majority stockholders, a final decision within the meaning of 28 U. S. C. Sec. 1291, so as to confer jurisdiction on a Court of Appeals to review such order." (The Motion to Dismiss which was overruled asked in the alternative for Summary Judgment.)

1. Summary.

The Court of Appeals has no jurisdiction to entertain an appeal unless the judgment appealed from is a "final decision." (28 U. S. C. Sec. 1291.) This Court specifically has held that an order overruling a Motion to Dismiss is not a final decision. Nor is such an order in the nature of an interlocutory order as defined in 28 U. S. C. Sec. 1292. Nor does the order in this case involve a collateral issue or separate claim having finality distinct from the issue presented by the main case.

Since the Court of Appeals had no jurisdiction to entertain the appeal, it properly dismissed it. We respectfully submit therefore that this Court should deny the petition for a writ of certiorari.

2. Discussion.

(a) Statute Prescribing Jurisdiction for Appeals.

Jurisdiction to entertain appeals from a District Court is vested in United States Courts of Appeals by 28 U. S. C. Sec. 1291, which reads:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

(b) The Overruling of a Motion to Dismiss Is Not Appealable.

The Court of Appeals had jurisdiction to entertain an appeal only if the judgment of the District Court was a "final decision." The denial of a Motion to Dismiss and/or for Summary Judgment is not a "final decision" within the meaning of said statute. This is a rule long established by decisions of the Supreme Court of the United States and the Circuit Courts of Appeals.

Thus in *Cusano* v. *St. Louis Shuffleboard Co.*, C. A. 8, 1952, 194 F. 2d 986, 987, the Court stated:

> "This appeal must be dismissed for want of jurisdiction. Courts of appeals with some exceptions not important here have jurisdiction to review only final judgments of district courts. 28 U. S. C., Sections 1291, 1292; *Moss* v. *Kansas City Life Ins. Co.*, 8 Cir., 96 F. 2d 108, 110; *Hunter* v. *Federal Life Ins. Co.*, 8 Cir., 103 F. 2d 192, 194; *Howell* v. *Terminal R. Ass'n of St.*

Louis, 8 Cir., 155 F. 2d 807, 808; *City of Louisa* v. *Levi,* 6 Cir., 140 F. 2d 512-514; *Breeding Motor Freight Lines* v. *Reconstruction Finance Corporation,* 10 Cir., 172 F. 2d 416, 425; *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, 29-30, 63 S. Ct. 938, 87 L. Ed. 1185. The order from which this appeal is taken is not a final judgment. It disposed of no issue in the case. There is no judgment against the plaintiff for costs or expenses, nor is the case dismissed. In effect the order denied the plaintiff's motion to dismiss except on conditions which plaintiff declined to accept. An order denying a motion to dismiss is not a final appealable judgment. *Southeastern Greyhound Lines* v. *McCafferty,* 6 Cir., 169 F. 2d 1, 3; *Catlin* v. *United States,* 324 U. S. 229, 236, 65 S. Ct., 631, 89 L. Ed. 911."

In *Southeastern Greyhound Lines* v. *McCafferty,* C. A. 6, 1948, 169 F. 2d 1, 3, the Court said:

> "On July 11, 1947 Masters, himself, moved the court to dismiss the complaint against him. This motion was properly denied. . . .
>
> Our conclusion is . . . that the appeal of Masters be and the same is dismissed. The order from which he undertook to appeal is not a final order."

This Court has held in *Catlin* v. *United States,* 324 U. S. 229, 236, that even the fact that the basis for the Motion to Dismiss is an asserted absence of jurisdiction does not create an exception.

> "But denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable."

(c) The Overruling of a Motion for Summary Judgment Is Not Appealable.

The same rule is followed on the overruling of a motion for summary judgment. See the case of *McGrath* v. *Hunt, Hill & Betts,* C. A. 2, 1952, 194 F. 2d 529, 530, where the Court said:

"It is clear from the district court's opinion that the order on appeal is not a final order. Denial of a motion for summary judgment is not an appealable order. *In re Finkelstein,* 2 Cir., 102 F. 2d 688, 689; *Marcus Brier Sons* v. *Marvlo Fabrics,* 2 Cir., 173 F. 2d; *Morganstern Chemical Co.* v. *Schering Corp.,* 3 Cir., 181 F. 2d 160, 161. Accordingly the appeal must be dismissed."

(d) CASES CITED BY PETITIONERS ARE NOT IN ANY WAY APPLICABLE.

Petitioners have cited three cases which they contend support the proposition that an order overruling a Motion to Dismiss is appealable. Not one of them, either directly or by logical inference, can be considered such support. Two of the cases—*Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541 (Petitioners' citation is in error) and *Swift & Co.* v. *Campania Colombiana,* 339 U. S. 684—are examples of the long established practice of this Court in giving the provisions of 28 U. S. C. Sec. 1291 a "practical rather than a technical construction." The Court, in *Cohen* v. *Beneficial Industrial Loan Corp.,* supra, characterized the type of order in the cited cases, as one which (at page 546) "did not make any step toward final disposition of the merits of the case and will not be merged in final judgment." Unlike those orders, the order in this case did make a step towards final disposition of the merits of the case and will be merged in final judgment. Neither case involved the assertion of federal jurisdiction. Neither case suggested nor implied that this Court's previous decision in *Catlin* v. *United States,* supra, was overruled or qualified. Neither case is relevant. Neither case substantiates the claim made for it by Petitioners in their Brief.

The third case cited by Petitioners—*Merkel Electric Products* v. *United States,* 202 F. 2d 435—involved an appeal from a decision of the District Court, which decision,

in the language of the Court of Appeals, was "the equivalent of the denial of an injunction." The appealability of such a decision is specifically provided for by statute (28 U. S. C. Sec. 1292) and the case is therefore wholly irrelevant to the meaning of "final decisions" in 28 U. S. C. Sec. 1291. There is absolutely no relationship between the assertion of federal jurisdiction in this case and the issuance or non-issuance of an injunction or interlocutory order.

(e) The District Court's Order Overruling the Motion to Dismiss Was Correct Since Federal Jurisdiction Was Properly Invoked.

Although we respectfully submit that the appeal should be dismissed for the reasons above stated, the Court may wish to know more of Respondents' position as to the nature of the controversy on the merits, as distinguished from questions of appeal procedure. We therefore are referring below to the merits of the appeal. The relief sought by the Respondents is described in the following prayer of the Complaint:

> "WHEREFORE, plaintiffs prays that the Court may enter an order, decree and judgment directed to the said defendants, William C. Schmidt and Carl Oscar Schmidt, Jr., also known as C. Oscar Schmidt, Jr., as the majority of the Board of Directors of the defendant Company, ordering and commanding that they forthwith cause a meeting of the Board of defendant Company to be called and held, that they take immediate steps for the declaration of a dividend by said defendant Company of Eighty-two ($82.00) Dollars per share, payable over a reasonable period and vote as said Directors in favor thereof; that the individual defendants cease and desist from the aforesaid combination and plan and the diverting of the profits of said defendant Company as aforesaid; that said defendant Company shall pay such dividends as ordered by the Board of Directors pursuant to the judgment and de-

cree of this Court, and for such other and further relief as may be equitable and proper in the premises."

Petitioners sought dismissal of the Complaint in the lower Court by alleging:

1. That there is no diversity of citizenship between the parties; and
2. That the Complaint does not set forth a cause of action arising out of any federal law.

The Complaint shows on its face that there is diversity of citizenship in that none of the plaintiffs is a citizen of Ohio, the state of citizenship of all the defendants, and that the amount in controversy as to *each* of the plaintiffs, taken severally, is more than Three Thousand ($3,000.00) Dollars. Petitioners asserted that Respondents brought suit in a representative capacity for all minority stockholders and argued that since some minority stockholders, though not parties to the suit, were citizens of Ohio, diversity jurisdiction thereby was defeated. Respondents, however, as clearly shown by the Complaint, did not bring suit in a representative capacity. They sought only to enforce their own individual rights. That stockholders may assert their individual rights in federal courts, invoking jurisdiction on the basis of diversity of citizenship, is clear from the following cases:

Sias v. *Johnson*, CCA 6, 1936, 86 F. 2d 766;
Kroese v. *General Steel Casting Corp.*, CCA 3, 1950, 179 F. 2d 760;
Whittemore, et al. v. *Continental Mills*, D. C. Me., 1951, 98 F. Supp. 387.

The right of an individual stockholder, as an individual and not as a party to a class action or in a representative capacity, to seek to compel the declaration of dividends was squarely presented to and recognized by the Court in

Giesecke v. *Denver Tramway Corp.*, D. C. Del., 1949, 81 F. Supp. 957, where at pages 961-962 the Court stated:

> ". . . An equitable suit to compel the declaration of a dividend is essentially a suit to compel the corporation or directors, to establish a common fund in which each stockholder is to have a separate and distinct interest.
>
> . . . No case has been found which expressly deals with the question here considered. There is, however, a multitude of cases containing judicial statements that an individual stockholder, under appropriate circumstances, may maintain a suit to compel the declaration of a dividend. [Cites: *Cratty* v. *Peoria Law Library Ass'n*, 1906, 219 Ill. 516, 76 N. E. 707, 708; *O'Neall Co.* v. *O'Neall*, 1940, 108 Ind. App. 116, 25 N. E. 2d 656; *Casson* v. *Bosman*, 1946, 137 N. J. Eq. 532, 45 A. 2d 807; see cases cited in Annotation 55 ALR 135, Fn. 357; 1 *Morawetz on Corporations* (2d ed.), Sec. 447.] In *City Bank Farmers' Trust Co.* v. *Hewitt Realty Co.*, 257 N. Y. 62, 177 N. E. 309, 76 ALR 881, the action clearly was brought on behalf of one stockholder alone. In *Cohn* v. *Cities Service Co.*, 2 Cir., 45 F. 2d 687, 689, an action was brought by one stockholder alone concerning rights of stock common to all stockholders. . . .
>
> The test in the present case is whether the present plaintiff, if he had owned sufficient stock in his own right to satisfy the jurisdictional requirement could have brought suit in his own name alone to compel the declaration and payment of the dividend. . . ."

Petitioners' claim is not only refuted by the cases and authorities, but their theory cannot stand analysis. Thus, probably, federal jurisdiction on the ground of the diversity of citizenship could not be obtained against any one of the large corporations in America in an action of this nature if the rule contended for by Petitioners were correct. It is practically certain that there always would be one or more stockholders who are citizens of the same state as the neces-

sary defendants, the corporation and its directors, and about whom a similar claim could be made. The incorrectness of the Petitioners' assertion that in such an action all stockholders are "indispensible parties" is further shown by noting that if a like action were brought, for example, against American Telephone and Telegraph Company, there would be, on Petitioners' theory, more than five hundred thousand "indispensible parties." Petitioners in the lower Court were unable to submit one case or authority, which on examination sustained the theory they were asserting.

(f) Jurisdiction Was Invoked on Ground of Diversity of Citizenship and Not on the Ground of an Alleged Violation of Section 102 of the Internal Revenue Code of the United States.

Petitioners have asserted (Brief page 14, IV) that alleged violation of Section 102 of the Internal Revenue Code does not give the District Court jurisdiction. At the outset it should be noted that jurisdiction of the District Court was invoked on the ground of diversity of citizenship and not on the ground of a violation of Section 102 of the Internal Revenue Code of the United States. The Court's attention, however, is called to the case of *Whittemore, et al.* v. *Continental Mills,* supra. There, the plaintiffs, residents and citizens of Massachusetts, instituted suit in the United States District Court for the Southern District of Maine as minority stockholders of the defendant corporation, organized under the laws of Maine. The impairment of corporate assets was alleged to be threatened by reason of the threat of the application of a penalty for violation of Section 102 of the Internal Revenue Code through an unreasonable accumulation of surplus. A motion to dismiss was filed, claiming that the complaint did not state a cause of action for relief in equity. The Court denied the motion to dismiss.

The requirements against the unreasonable accumulation of surplus are requirements of the Federal Tax laws. We

submit that it may properly be held that the violation of Internal Revenue laws of the United States is a proper ground to permit a stockholder to ask for relief against the damage caused him by the violation. This is not the case of a criminal statute as to which a different rule might apply. It should be noted again that Section 102 of the Internal Revenue Code was only one of the grounds for asserting relief and that the Complaint states a cause of action, even without any reliance on Section 102 of the Internal Revenue Code. It should be observed that no question as to the application of Section 102 possibly could be an issue on the pending Petition for Certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

James L. Magrish,
Attorney for Respondents.

Morse Johnson,
Of Counsel.